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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DARRELL EDWARD ADAMS,

Defendant and Appellant.

G041461

(Super. Ct. No. RIF108462)

O P I N I O N

Appeal from a judgment of the Superior Court of Riverside County, Donal B. Donnelly, Judge. (Judge of the Imperial Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Reversed and remanded.

Marcia R. Clark, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Barry Carlton and Elizabeth A. Hartwig, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Defendant Darrell Edward Adams appeals from the judgment entered after a jury found him guilty of attempted murder and unlawful possession of a firearm and ammunition. Defendant argues the trial court erred by admitting the victim's preliminary hearing testimony into evidence at trial because the prosecution had failed to exercise due diligence in searching for the victim and thus did not demonstrate the victim's unavailability within the meaning of Evidence Code section 240.

We reverse. In *People v. Cromer* (2001) 24 Cal.4th 889, 904-905 (*Cromer*), the California Supreme Court held the prosecution failed to exercise due diligence in searching for a witness and the trial court erred by admitting that witness's preliminary hearing testimony at trial on the ground the witness was unavailable. In *Cromer*, the subject witness was critical to proving one of the charged offenses, the prosecution was on notice the witness no longer lived at her last known address, and, even though trial was originally scheduled for September 1997, the prosecution did not make a "serious effort" to search for the witness until December 1997, several weeks before the case was called for trial. (*Id.* at pp. 893, 904.)

Here, the record shows the prosecution's investigator was first assigned to locate the victim no earlier than eight days before trial, even though the victim's testimony was critical to the prosecution's ability to prove the charged offenses and no documented contact had been made with the victim by law enforcement in 17 months (notwithstanding multiple continuances of the trial date). Furthermore, the record shows that during the two-day hearing on whether the prosecution exercised due diligence in searching for the victim, the prosecution's investigator cultivated some leads as to the victim's whereabouts but he apparently ran out of time to pursue them. Applying *Cromer, supra*, 24 Cal.4th 889, we must conclude the prosecution failed to exercise due diligence in searching for the victim and the trial court erred by admitting the victim's preliminary hearing testimony at trial.

BACKGROUND

A.

FELONY COMPLAINT AND PRELIMINARY HEARING

In April 2003, the district attorney filed an amended felony complaint alleging that, on February 18, 2003, defendant attempted to murder Justin Gray and unlawfully possessed a firearm and ammunition. Gray was the sole witness to testify at defendant's preliminary hearing on November 1, 2004. Gray was cross-examined by defendant who was representing himself in propria persona at that time.

Gray's testimony included the following. In February 2003, Gray was living with his father in Murrieta, California. Gray wished to sell his 1984 Oldsmobile Cutlass Supreme and placed a "For Sale" sign in the window of the car, which included his telephone number and indicated he would accept \$2,000 or "OBO" meaning "[o]r best offer."

Gray was driving his car down a street in the City of Perris when a green Honda, driven by defendant, pulled up on the left side of his car. Gray testified defendant "was . . . flagging [Gray] down," indicating "what's up with the car." Gray told defendant, "[p]ull over [a]nd I'll explain." Gray pulled into a parking lot, got out of his car, and starting talking with defendant about the car. Defendant asked Gray questions and inspected the car "[i]nside and out." Gray told defendant how much he wanted for the car, they negotiated a price, and they exchanged telephone numbers.

Gray and defendant had telephone conversations about the car. Defendant told Gray he wanted to meet to coordinate buying the car; Gray agreed. Defendant told Gray to meet him at 11:00 a.m. at a gas station. Gray was at the gas station at the agreed-upon time, but defendant did not show up. Figuring defendant's interest in the car might have been a hoax, Gray went home and "let it go."

Defendant called Gray at his father's house. Defendant told Gray that he was "ready" and told him to bring the car to his place. Gray agreed to meet defendant at 6:00 p.m. on February 18, 2003 at a gated apartment complex in Riverside. Defendant gave Gray directions and a code to get through the gate of the complex.

Gray drove the car to defendant's apartment complex; he had the car's registration and pink slip with him. Inside the complex, Gray was approached by an unidentified man who asked him if he was looking for defendant; Gray said, "yes, I am." The man told Gray defendant was on his way and instructed Gray to follow him to an apartment. Gray followed the man into an apartment where he waited about 15 minutes. A phone rang in the apartment and the man told Gray that defendant was "here." Defendant entered the apartment and asked Gray, "[a]re we ready to make a transaction?" to which Gray responded, "[y]es." Defendant and Gray had previously agreed on a purchase price of \$1,500.

Defendant and Gray walked to the parking lot. Defendant told Gray he had some of the money with him but had to pick up the rest of it at a friend's house in a different city. He told Gray to "jump in with me. We will go over there and get the money and exchange it and bring the paperwork, and then I will drop you off to your house."

Gray got into defendant's car. Defendant drove to Moreno Valley and turned down a dirt road. He stopped the car near a house and said, "this is where the money is, where my friends stay at." Gray said, "okay" and turned to look at the house.

As Gray was looking at the house, he heard defendant ask, "are you ready?" Defendant reached over and shot Gray in the chest. Gray "froze up and like panicked," saw he had been shot, unbuckled his seatbelt, jumped out of the car, and ran. Defendant ran after Gray; defendant shot Gray in the rib cage area and in the waist, and grazed Gray's right forearm as he was running. Gray heard other shots fired that did not strike him. Gray continued running until he reached a house where he received assistance.

At the conclusion of Gray's testimony, the trial court found there was sufficient cause to believe defendant guilty of the alleged offenses and ordered defendant held to answer.

B.

INFORMATION

Defendant was charged in an information with (1) attempted murder in violation of Penal Code sections 664 and 187,¹ subdivision (a) and personally and intentionally discharging a firearm in the commission of this crime, causing great bodily injury in violation of sections 12022.53, subdivision (d) and 1192.7, subdivision (c)(8); (2) possession of a firearm in violation of section 2021, subdivision a)(1); and (3) possession of ammunition and reloaded ammunition in violation of section 12316, subdivision (b)(1). The information alleged that, in 1995, defendant was convicted of reckless evasion of a peace officer in violation of Vehicle Code section 2800.2, for which he served a separate prison term and did not remain free of prison custody for five years before committing another felony, within the meaning of Penal Code section 667.5, subdivision (b). The information further alleged that, in 1995, defendant was convicted of robbery, a serious and violent felony within the meaning of sections 667, subdivisions (a), (c), and (e)(1), and 1170.12, subdivision (c)(1).

C.

PROSECUTION MOVES TO ADMIT GRAY'S PRELIMINARY HEARING TESTIMONY.

On August 14, 2007, the date on which the case was set for trial, the court held a hearing on the prosecution's motion seeking to admit Gray's preliminary hearing

¹ All further statutory references are to the Penal Code unless otherwise specified.

testimony on the ground he was unavailable to testify at trial.² David Joseph Grande,³ a senior investigator with the Riverside County District Attorney's Office, testified that, on August 6 or 7, about a week before trial, he was first assigned the task of locating Gray. The record is not clear when Grande began actively searching for Gray after he was assigned to find him. Grande testified that no other investigators had documented any due diligence efforts to try to locate Gray.

Grande testified the last documented contact with Gray in Riverside County occurred in March 2006. Grande testified that using Gray's name and date of birth, he ran a series of record checks through different computer systems that are available through the district attorney's office. Grande's efforts to find Gray included searching various Web sites, including local county jail Web sites, a nationwide law enforcement computer system which would have notified him if Gray was wanted by law enforcement in any state, local records to determine whether Gray was on probation or parole, Westlaw, a records check through the Department of Motor Vehicles Web site, ZabaSearch, and Yellow Pages.

Grande learned that although Gray had several prior arrests and convictions, he had no "outstanding cases" and was neither on probation nor on parole. Grande determined Gray's last known residence was an apartment in Lake Elsinore.

Grande spoke to Gray's father on the telephone. Gray's father told Grande that Gray had left Riverside County three months earlier and he had not seen or spoken to Gray since then. He believed Gray might have moved to the Oakland area. He told Grande that after Gray was shot, he had asked for assistance as a victim for his injuries and medical bills, but because he was on parole at that time, he was denied those services

² The trial court stated the prosecution had filed a trial brief relating to the use of Gray's testimony and a copy of the investigator's due diligence report. Neither appears in our record.

³ Grande had been a district attorney investigator for about five months, but had 23 years of experience as a law enforcement officer.

and resources. Gray was frustrated and “very much” upset with the district attorney’s office due to the denial of resources, and “he no longer wanted anything to do with this case.” Gray’s father said, “[t]hat was the reason why [Gray] left.” Grande described Gray’s father as “very, very cooperative, very low-key, very talkative,” and stated he “answered all the questions that [Grande] gave him without any hesitation at all.”

Grande checked in Riverside, Los Angeles, San Diego, San Bernardino, and (based on the information provided by Gray’s father) Alameda Counties to determine whether Gray was in custody. He unsuccessfully attempted to obtain information from the state and federal governments to determine whether Gray had reported income for 2006.

Grande testified he felt he had exhausted his efforts to find Gray and stated he “used every resource that was available to [him].”

Grande did not speak with Gray’s parole officer. No attempt was made to serve a subpoena on Gray. Grande did not know Gray had been married, and did not check with Gray’s ex-wife. He did not speak with Gray’s mother who lived with Gray’s father. He did not check old addresses, or check with any of Gray’s old friends.

The hearing on the prosecution’s motion continued the following day. Grande stated that after he had testified at the hearing the day before, he contacted Gray’s parole officer, and learned Gray was discharged on June 16, 2005. Grande confirmed Gray’s father’s address was the same address the parole officer had. An investigator then went to Gray’s parents’ house and spoke with Gray’s father and mother who said they did not know where Gray was. Gray’s mother told the investigator that she had seen Gray about a month earlier and he was driving a green Cadillac.

Grande contacted Gray’s mother. He testified, “she was very evasive, very uncooperative as far as being forthwith with information for [Gray]. She stated she saw him about a month ago and that he had come to visit her and he was driving a green Cadillac. She said that she had no address for him, no telephone number or . . . cell

phone number.” He stated that when he tried to inquire further, “she became extremely uncooperative, and [he] ended the interview.” Grande told her he was trying to serve Gray with a subpoena.

Grande conducted a further records check and learned that Gray owned a 1995 Cadillac that was inoperable as of May 8, 2007 and registered to his parents’ address. Grande also started to look for Gray’s ex-wife. The telephone number listed for her last known address was disconnected. Through the Department of Motor Vehicles, he found an address in Long Beach as of April 2006 for Gray’s ex-wife, but he was unable to obtain a telephone number or any other information.

Grande visited an apartment in Lake Elsinore where Gray and his ex-wife had lived. A manager of the apartment complex told Grande that Gray and his ex-wife had lived there for a couple of months and they had moved out three years earlier. The apartment manager described Gray as violent and told Grande, “there were numerous contacts by law enforcement for domestic violence incidents.” The manager said he had seen Gray about a month earlier at a supermarket in Lake Elsinore but did not speak with him. Gray appeared to be under the influence.

Grande also contacted the Oakland Police Department and asked the records department to check for activity on Gray. He was informed there were no contacts or arrests for anyone who matched the information provided about Gray (although another Justin Gray with a different birth date and license number was found).

Defendant testified that he was in propria persona at the preliminary hearing. He testified that before the preliminary hearing, he had made a formal request for certain documents, including medical records depicting Gray’s injuries, which were not provided to him. He said his cross-examination of Gray was “fruitless” because he lacked the medical records, he was displeased with his investigator, and a previous trial judge assigned to the case ordered there would be no further continuances.

Detective Duke Viveros testified that he was the lead investigating officer of the shooting on February 18, 2003. He said that the contents of the police report included a description of Gray's injuries and described what had happened at the hospital.

D.

TRIAL COURT FINDS PROSECUTION CONDUCTED DUE DILIGENCE
IN SEARCH FOR GRAY, FINDS GRAY UNAVAILABLE, AND ADMITS
GRAY'S PRELIMINARY HEARING TESTIMONY AT TRIAL.

The trial court granted the prosecution's motion to admit Gray's preliminary hearing testimony. With regard to the issue of due diligence, the court stated in relevant part:

"I have read and considered and evaluated all of the evidence in this motion, including the testimony of Mr. Grande, Mr. Viveros, and Mr. Adams. I have considered the exhibits that have been admitted into evidence. I will take judicial notice of the orders and decisions of the court that have been made throughout this case as reflected in the minutes of this case.

"With regard to other minutes, other than orders, I'll make note of the evidentiary presumption that official records are presumed correct. I'll leave it at that. Counsel stipulated that I may consider the transcript of the preliminary hearing also as evidence in the matter.

"Let's turn first to the issue of witness unavailability and due diligence to locate him under Evidence Code Section 240. It appears the appropriate subsection is 240[, subdivision] (a)(5), that the declarant is absent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his attendance by the court's process.

"I'll find the prosecution has exercised due diligence and made reasonable efforts to locate Justin Gray. As a matter of fact, I find that the investigator Grande's testimony as well as the contents of People's No.1 establish a rather extraordinary and

diligent effort, at least in terms of searching in all of the appropriate ways. The evidence is replete with instances of checking local custodial facilities, law enforcement personnel, engaging in standard Internet search engines, inquiring of family members. There was a supplemental effort to contact and learn information from the former spouse.

“So the standard here is that the proponent must establish by a preponderance that due diligence was made, and I find that has been well established in the record. I think the chief challenge is the timing of the effort. I have reviewed the appellate law cited by [the prosecutor], and it does appear to be the appropriate relevant governing law.

“In this case, it appears that Mr. Grande started on or about—I believe he said August 6 or August 8th, perhaps, which is before the actual commencement of the trial and jury selection. Although it might have been preferable and more appropriate for the prosecution to have commenced its efforts to locate and serve Mr. Gray before that time, the law doesn’t require that, and I think there are a couple of peculiar factors in this case that may excuse that.

“I’ll note first and foremost are the number of continuances in this case. This matter is an aged case. The parties have waived time repeatedly over several years. And more specifically I’ll note that in the spring and summer of this year, beginning in, let’s say about March, April, May, June, July, I’ll note that the record reflects that trial dates were set throughout that time, yet time continued to be waived and the trial reset again.

“So I think the prosecution’s timeliness is partially justified by the mere—merely the repeated delays in the case. I find no substantial or credible evidence that this was a scheme on anyone’s part to secure the absence of Mr. Gray. It was just part of the long, frustrating process in this case. I find that to be important. So a diligent effort has been made, and it is timely based on the circumstances of this case. So I will find that [Evidence Code section]240 has been complied with.”

The trial court also stated:

“Do we wish things could have been done differently in this case?

I suspect in hindsight we do. I would certainly encourage both parties to continue exercising reasonable and diligent efforts to locate the alleged victim in this case and bring him into court. However, at this point I’ll find that the hearsay exception and all of its requirements have been met.

“So I will grant the prosecution’s motion to allow the alleged victim’s testimony at the preliminary hearing into evidence. And we’ll deal with this more specifically at a later point. But just as a tentative ruling on it, I’ve reviewed the transcript. I am prepared to allow the transcript to be read with two exceptions.”

E.

TRIAL AND APPEAL

In addition to Gray’s preliminary hearing testimony, testimony was offered by law enforcement personnel involved in investigating Gray’s shooting and by medical personnel involved in treating Gray’s injuries. The parties stipulated that Gray had previously been convicted of attempted robbery on March 4, 1999 and of robbery on November 10, 1999.

One of defendant’s former roommates testified that after defendant met a person in the parking lot of their apartment complex to buy a car, he left and returned to the apartment they shared after midnight. The next morning, defendant showed him bullet holes in the passenger side door and seat of the Honda. The roommate also testified he might have stated to a detective that defendant told him the bullet holes in the car resulted from being carjacked by someone named “Mookie,” who arrived in a red vehicle, fired two or three shots through the window of the car, and took the cash defendant had to purchase the Oldsmobile. A woman who was living in the same

apartment with defendant testified that before Gray's shooting, defendant had shown her a gun in a fax machine in his bedroom.

The jury found defendant guilty of premeditated attempted murder and for illegally possessing a firearm and ammunition. The jury also found the firearm enhancement true, and the court found the prior conviction and prior prison term enhancement allegations true. The trial court imposed a determinate term of 10 years, a consecutive term of 25 years to life, and a consecutive term of life with the possibility of parole.

Defendant appealed.

DISCUSSION

Defendant contends the trial court erred by admitting Gray's preliminary hearing testimony because the prosecution failed to exercise due diligence in securing Gray's appearance at trial. For the reasons explained in detail *post*, we agree.

A.

GOVERNING CONSTITUTIONAL AND STATUTORY PRINCIPLES AND STANDARD OF REVIEW

In *People v. Friend* (2009) 47 Cal.4th 1, 67-68, the California Supreme Court restated the constitutional and statutory principles governing the admissibility of an unavailable witness's former testimony at trial: "'A criminal defendant has the right under both the federal and state Constitutions to confront the witnesses against him [or her]. [Citations.] This right, however, is not absolute. The high court . . . reaffirmed the long-standing exception that '[t]estimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross examine.'" [Citation.] 'Evidence Code section 1291 codifies this traditional exception.' [Citation.] 'When the requirements of Evidence

Code section 1291 are met, “admitting former testimony in evidence does not violate a defendant’s right of confrontation under the federal Constitution. [Citations.]” [Citation.] [¶] ‘Evidence Code section 1291, subdivision (a)(2), provides that former testimony is not rendered inadmissible as hearsay if the declarant is “unavailable as a witness,” and “[t]he party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing.” . . . Evidence Code section 240, subdivision (a)(5), states a declarant is “unavailable as a witness” if [he or she] is “[a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court’s process.”’”

The Supreme Court further stated: “‘The term “reasonable diligence” or “due diligence” under Evidence Code section 240, subdivision (a)(5) “connotes persevering application, untiring efforts in good earnest, efforts of a substantial character. [Citations.]”’ [Citation.] ‘Considerations relevant to this inquiry include the timeliness of the search, the importance of the proffered testimony, and whether leads of the witness’s possible location were competently explored.’ [Citation.] ‘We independently review a trial court’s due diligence determination.’ [Citation.]” (*People v. Friend, supra*, 47 Cal.4th at pp. 68-69.)

B.

CROMER, SUPRA, 24 CAL.4TH 889 AND
PEOPLE V. SANDERS (1995) 11 CAL.4TH 475

In *Cromer, supra*, 24 Cal.4th 889, 903, the victim testified at the preliminary hearing in June 1997. Two weeks after the preliminary hearing, officers patrolling the victim’s neighborhood noticed and reported that the victim “was no longer there.” (*Ibid.*) Trial in the matter was originally scheduled for September 1997, and was

rescheduled multiple times before it was set for January 12, 1998. (*Ibid.*) The Supreme Court noted, “[d]espite [the victim]’s June 1997 disappearance from her neighborhood, it was not until December 1997, with the January 12, 1998, trial date looming ahead, that the prosecution made any serious effort to locate her. Two investigators went to [the victim]’s former residence five or six times, only to be informed by a woman at that address that [the victim] no longer lived there.” (*Ibid.*)

Trial was continued two more times and then the matter was put over to January 22, 1998. (*Cromer, supra*, 24 Cal.4th at p. 903.) On January 20, a man at the victim’s former residence told investigators that the victim was living with her mother in San Bernardino. (*Ibid.*) The investigators waited two days before an investigator obtained the victim’s mother’s address and contacted a woman at that house who told him the victim’s mother was out, but would return the next day. (*Id.* at pp. 903-904.) The woman also told the investigator that the victim did not live there. (*Id.* at p. 904.) The investigator left a copy of a subpoena for the victim. (*Ibid.*) “Apart from consulting computerized information systems, the county jail, and the county hospital, the prosecution made no other efforts to locate [the victim].” (*Ibid.*)

The trial court admitted the victim’s preliminary hearing testimony into evidence at trial after determining that the prosecution had used reasonable diligence in attempting (unsuccessfully) to secure the victim’s attendance at trial. (*Cromer, supra*, 24 Cal.4th at p. 904.) The victim’s preliminary hearing testimony was the only evidence presented in support of one of the robbery charges alleged against the defendant. (*Id.* at p. 893.) On appeal, the defendant challenged the admission of the victim’s preliminary hearing testimony on the ground the prosecution had failed to use reasonable diligence to find the victim. (*Ibid.*) The appellate court agreed with the defendant and reversed the judgment of conviction as to that robbery count. (*Ibid.*)

The Supreme Court affirmed the appellate court’s reversal of the robbery count, concluding that “the prosecution had failed to demonstrate due diligence in its

efforts to locate [the victim] for trial.” (*Cromer, supra*, 24 Cal.4th at p. 903.) The Supreme Court stated that the relevant considerations for determining whether the prosecution conducted due diligence included the timeliness of the search, the importance of the witness’s testimony, and whether leads were competently explored. (*Id.* at p. 904.) The Supreme Court stated: “Here, as the Court of Appeal correctly concluded, the undisputed facts do not demonstrate that the prosecution exercised reasonable diligence to secure [the victim]’s attendance at defendant’s trial. Although the prosecution lost contact with [the victim] after the preliminary hearing, and within two weeks had received a report of her disappearance, and although trial was originally scheduled for September 1997, the prosecution made no serious effort to locate her until December 1997. After the case was called for trial on January 20, 1998, the prosecution obtained promising information that [the victim] was living with her mother in San Bernardino, but prosecution investigators waited two days to check out this information. With jury selection under way, an investigator went to [the victim]’s mother’s residence, where he received information that the mother would return the next day, yet the investigator never bothered to return to speak to [the victim]’s mother, the person most likely [to] know where [the victim] then was. Thus, serious efforts to locate [the victim] were unreasonably delayed, and investigation of promising information was unreasonably curtailed. [¶] The prosecution failed to exercise reasonable diligence to secure [the victim]’s attendance at defendant’s trial.” (*Id.* at pp. 904-905.)

In *Cromer, supra*, 24 Cal.4th at page 904, the Supreme Court cited *People v. Sanders* (1995) 11 Cal.4th 475, 523, in support of the proposition that the relevant considerations of whether due diligence has been satisfied includes ““whether the search was timely begun.”” In *People v. Sanders, supra*, 11 Cal.4th at page 522, the trial court denied the defendant’s request that it admit into evidence at trial a witness’s prior testimony on the ground the witness was unavailable. In that case, the defendant first

attempted to serve the witness with a subpoena to appear at trial eight days before the due diligence hearing. (*Id.* at p. 524.)

The Supreme Court in *People v. Sanders, supra*, 11 Cal.4th at page 524 concluded: “[B]ased on our independent review, we find that defendant did not conduct a diligent good faith search under Evidence Code section 240, subdivision (a)(5). The defense was well aware, before trial began, of the nature and importance of [the witness]’s testimony.” The court further observed the defendant made no effort to subpoena the witness until well into the trial even though the defense investigator knew the witness might not be a “totally reliable person” and was known to be uncooperative. (*Ibid.*) The Supreme Court stated, “[e]ven then, belated efforts to locate her were minimal, consisting of a single phone call to her former work number and several visits to her former address. Attempts to obtain information from [the witness]’s husband] or anyone else at the address were perfunctory; no relatives, friends, or coworkers appear to have been contacted. In sum, the record suggests that the defense was insufficiently diligent in attempting to determine from [the witness]’s husband or anyone else where [the witness] might be located.” (*Id.* at pp. 524-525.)

C.

THE PROSECUTION FAILED TO SHOW IT CONDUCTED DUE DILIGENCE IN SECURING GRAY’S ATTENDANCE AT TRIAL.

Applying the due diligence standard required in *Cromer, supra*, 24 Cal.4th at page 904, we conclude the prosecution failed to show it conducted due diligence in its search for Gray. We begin by noting the critical significance of Gray’s testimony. His testimony alone described the circumstances leading up to and during the shooting. The Attorney General does not dispute the significance of Gray’s testimony in proving the charged offenses.

Next, we observe the record shows Grande's search was not ""timely begun."" (Cromer, supra, 24 Cal.4th at p. 904.) Gray testified at defendant's preliminary hearing in November 2004. Grande testified that the last documented contact with Gray in Riverside County was in March 2006. Grande further testified that he was first assigned the task of searching for Gray on August 6 or 7, 2007—only seven or eight days prior to the trial date. Grande did not testify whether he immediately commenced his search upon being assigned this task. He did testify that no other investigators had previously documented any efforts in locating Gray. (See Cromer, supra, 24 Cal.4th at p. 904 [prosecution did not exercise reasonable diligence when it did not make a "serious effort" to locate the victim until December 1997 when trial was originally scheduled for September 1997 and the case was actually called for trial in January 1998].) Here, the record shows that, as early as June 2005, the prosecutor announced he was ready for trial, even though the record does not show any attempt by the prosecution to subpoena Gray or any explanation as to why a subpoena would have been unnecessary.

People v. Wilson (2005) 36 Cal.4th 309, 341-342, in which the Supreme Court rejected the defendant's argument the prosecution failed to conduct a timely search for a witness, is distinguishable from the instant case. In *People v. Wilson*, a detective testified that *three months before* the due diligence hearing, he had made efforts over two days to locate the witness. (*Id.* at p. 341.)⁴

Finally, we consider whether Grande "competently explored" leads in his search for Gray. (Cromer, supra, 24 Cal.4th at p. 904.) At the hearing on whether to admit Gray's preliminary hearing testimony, similar to the prosecution in *Cromer, supra*,

⁴ In *People v. Wilson, supra*, 36 Cal.4th at page 342, the defendant criticized the prosecution for starting the search for a witness to testify at the retrial of the case one year after the Supreme Court had reversed the judgment. The Supreme Court stated, however, "[t]he prosecution is not required 'to keep "periodic tabs" on every material witness in a criminal case,'" and "the prosecution is not required, absent knowledge of a 'substantial risk that this important witness would flee,' to 'take adequate preventative measures' to stop the witness from disappearing." (*Ibid.*)

24 Cal.4th at page 904, Grande testified he consulted “computerized information systems.” He thereafter concluded Gray was not currently in custody, was on neither probation nor parole, and did not have any “outstanding cases.” Grande also spoke to Gray’s father who told him Gray might have moved to the Oakland area. Grande also attempted, unsuccessfully, to obtain information from the state and federal governments to determine whether Gray had reported income for 2006. Grande testified he had exhausted his efforts to find Gray and “used every resource that was available” to him in doing so.

Although the prosecution need only use ““reasonable efforts to locate [a] witness”” (*People v. Valencia* (2008) 43 Cal.4th 268, 293), it is material that on cross-examination, Grande admitted he had not spoken with Gray’s parole officer, never attempted to serve a subpoena on Gray, did not know Gray had been married (and thus had not attempted to contact his ex-wife), did not speak with Gray’s mother (who lived with Gray’s father), or had not checked with any of Gray’s friends.

When the hearing on the admissibility of Gray’s preliminary hearing testimony continued for a second day, Grande stated that he made further efforts to locate Gray after testifying the day before. Grande testified he contacted Gray’s parole officer, and learned Gray was discharged in June 2005 and the parole officer had Gray’s father’s address in his records. An investigator then went to Gray’s parents’ house and spoke with Gray’s mother who told him she had seen Gray about a month earlier. Grande also testified he visited an apartment where Gray and his ex-wife once lived. The manager at the apartment building reported seeing Gray a month earlier at a local grocery store. Although Grande found an address as of April 2006 for Gray’s ex-wife, he did not find a telephone number for her and apparently had not contacted her. Thus, once Grande dug just a little deeper into his search for Gray beyond conducting computer searches and placing a telephone call to Gray’s father, he found evidence of Gray’s recent appearance in the area but apparently ran out of time to explore those leads.

We therefore conclude that under the circumstances here, the prosecution failed to search for Gray with “‘*persevering application, untiring efforts in good earnest, [and] efforts of a substantial character.*’” (*Cromer, supra*, 24 Cal.4th at p. 904, italics added.) The trial court, in turn, erred by finding Gray an unavailable witness within the meaning of Evidence Code section 240 and admitting Gray’s preliminary hearing testimony accordingly. In the respondent’s brief, the Attorney General does not argue a further search for Gray would have been futile or otherwise argue harmless error. As acknowledged by the prosecution at oral argument, under the circumstances of this case, any such harmless error argument would fail because it would be entirely based on speculation.

Because we conclude the trial court erred by admitting Gray’s preliminary hearing testimony, we reverse the judgment and remand the matter to the trial court. In *People v. Story* (2009) 45 Cal.4th 1282, 1296-1297, the California Supreme Court stated: “[W]hen reviewing the sufficiency of the evidence for purposes of deciding whether retrial is permissible, the reviewing court must consider *all* of the evidence presented at trial, including evidence that should not have been admitted. ‘[W]here the evidence offered by the State and admitted by the trial court—whether erroneously or not—would have been sufficient to sustain a guilty verdict, the Double Jeopardy Clause does not preclude retrial.’ [Citation.] Accordingly, ‘a reviewing court must consider all of the evidence admitted by the trial court in deciding whether retrial is permissible under the Double Jeopardy Clause’ [Citation.] We have followed the high court in this regard. [Citations.]”

Defendant does not argue there was insufficient evidence to support his conviction when considering all of the evidence (including Gray’s preliminary hearing testimony) that was admitted during the trial. On remand, therefore, retrial is permissible.

Because we reverse the judgment, we do not need to reach defendant's argument the trial court violated section 654 by imposing sentence on the firearm possession count.

DISPOSITION

The judgment is reversed and the matter is remanded to the trial court.

FYBEL, J.

WE CONCUR:

MOORE, ACTING P. J.

ARONSON, J.